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Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF UTAH, DUCHESNE COUNTY, UTAH, UINTAH COUNTY, UTAH, ROOSEVELT CITY and DUCHESNE CITY, UTAH

Petitioners,

v.

UTE INDIAN TRIBE,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

REPLY BRIEF

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1. In light of the Tribe's response, Petitioners suggest that it may be appropriate for the Court to invite the United States to express its views in this case. Since *Seymour*, the Court has issued such orders prior to granting certiorari in each of the reservation boundary cases it has decided.[1]

The court below held that the Tribe's original 4-million acre reservation had not been diminished to a 1-million acre reservation as Petitioners had argued.[2] But in 1954, the Ute Indian Tribe of the Uintah and Ouray Reservation[3]—the Respondent here—stated in congressional hearings that its reservation only "embraces an area of some 1,065,000 acres. . . ."[4] Relying on that representation,[5] Congress enacted the

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[1] See the Orders in *Solem v. Bartlett*, 460 U.S. 1035 (1983); *Rosebud Sioux Tribe v. Kneip*, 423 U.S. 1047 (1976); *DeCouteau v. District County Court*, 416 U.S. 966 (1974); *Mattz v. Arnett*, 409 U.S. 819 (1972); *Seymour v. Superintendent*, 368 U.S. 351, 352 (1962).

[2] The original Uncompahgre and Uintah reservations, which the court of appeals held still exist undiminished, contained approximately 4 million acres. Pet. 2. What had been considered the Tribe's reservation until this case comprised approximately 1 million acres of trust lands. Pet. 5.

[3] The Tribe's reservation today, whatever its exterior boundaries may be, is called the "Uintah and Ouray Reservation" and the respondent Tribe is officially designated the "Ute Indian Tribe of the Uintah and Ouray Reservation" (*e.g.* 25 U.S.C. § 671). See Pet. App. 113a-114a.

[4] Hearings on S. 3532 and H.R. 9398 before the Subcommittee of the Senate Committee on Interior and Insular Affairs, 83d Cong., 2d Sess. 5 (June 9, 1954) (unpublished) (testimony of the Chairman of the Tribe's Business Committee). See note 8 *infra*.

[5] See S. Rep. No. 1632, 83d Cong., 2d Sess. 6 (1954), which was part of the record in this case (L.D. 193).

Ute Partition Act (68 Stat. 868, as amended, 25 U.S.C. §§ 677-677aa), dividing the Tribe's assets between its full-blood and mixed-blood members.

When a case involving the Ute Partition Act reached this Court, the United States also took the position, consistent with the Tribe's submission to Congress but contrary to the decision here, that the Tribe's reservation consisted of trust lands[6]—some 1 million acres.[7] As the Petition points out (at p.9), this Court relied on the representations of the Tribe[8] and the United States and stated in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 141 (1972), that "There is, and can be, no dispute that the United States holds title to the land, including mineral interests, constituting the Uintah and Ouray Reservation." 406 U.S. at 141. The Court's statement is, as the Petition further indicated, directly contradicted by the decision below.

Thus, prior to the instant case, this Court, the United States and the Tribe itself had taken the position that the Ute Tribe's reservation consisted of 1 million acres, not the 4 million acres encompassed within the boundaries of the original Uncompahgre and Uintah reservations, as the court below held. But the Tribe, in opposing certiorari, says not a word

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[6] See Brief for the United States and Brief for the Securities and Exchange Commission as Amicus Curiae in *Reyos*, at p.28, No.70-78, October Term 1971, in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972).

[7] See note 2 *supra*.

[8] The Hearings (note 4 *supra*) were part of the record in *Affiliated Ute Citizens*. See Brief for the United States, note 6 *supra*, at p.33 n.28.

about *Affiliated Ute Citizens v. United States*. It fails to confront the federal government's representations to this Court in *Andrus v. Utah*, 446 U.S. 500 (1980), that the original Uncompaghre reservation does not exist and has not existed since 1897. See Pet. 9; Pet. App. 366a-369a. And it does not, indeed cannot, explain why—if the decision below is correct—the Tribe was entitled to recover damages, as it did, against the United States in 1965 on the basis of its claim that the Uncompahgre Band of Utes "have lost the reservation set aside for their use," that the federal government "refused to provide any reservation for said Indians," and that the government did not maintain the original "Uncompahgre Reservation in Utah as a reservation."[9] See Pet. 10-11 n.22; *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, ___ U.S. ___, 105 S.Ct. 3420, 3432 (1985).

Petitioners therefore respectfully suggest that the Court may wish to invite the United States to file a brief expressing its view in this case.

2. The Tribe does not question that at least 18,000 non-Indians live in the disputed area while the total membership of the Tribe is only 1,500. See Pet. 10.[10] The Tribe says, however, that one area—the disputed

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[9] See the Tribe's Petition, at p.7, in *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 349, 14 Ind. Cl. Comm. 707 (1965).

[10] The Tribe also says that Petitioners have attempted to "reshape" the decision below "from a decision that addresses land status to one that impacts people." Brief in Opp., at 3. One of the fundamental errors of the court of appeals is that it never considered the impact on people, which it was required to do. See *Solem v. Bartlett*, 465 U.S. 463, 471-72 & n.12 (1984), and the Petition in this case, at p.21.

portion of the original Uncompaghre reservation—is thinly populated. Brief in Opp., at 3. What the Tribe does not explain is why this area, which has not been treated as a reservation since 1897, should now be deemed such when there is no evidence that even a single tribal member lives there, when there is not even one acre of Indian land there[11], when in the words of *Solem* the area "has long since lost its Indian character" (465 U.S. at 471).

On the other hand, it is not true that this area plays no "significant role in the lives of the non-Indian residents of the Unita Basin" (Brief in Opp., at p.3). The record lends no support to such an assertion and, to the contrary, shows that the area contains major mining and other industrial interests, including those involving gilsonite. See Pet. App. 22a-23a; Joint Ex. 479; and Appendix C & D, to the Supp. Brief filed by Petitioners Counties and Cities in the court below. The area, moreover, is also part of the Vernal Grazing District established pursuant to the Taylor Grazing Act, 43 U.S.C. 315, *et seq.*[12] Yet if, as the court below held, the area should now be considered an Indian reservation, all grazing permits would have to be cancelled. The Taylor Grazing Act specifically provides that the Secretary of the Interior may not establish grazing districts in "Indian reservations." 43 U.S.C. § 315.

This is a matter of major significance. Indeed, when Congress extended the Tribe's reservation in 1948 to

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[11] See the map lodged with this Court (Pet. 2 n.1) (Ex. I-1B). The map shows that there are substantial amounts of State and private lands within this area.

[12] See the map lodged with the Court (Pet. 2 n.1), which depicts the "District Boundary" in gray lines.

encompass part of the former Uncompahgre reservation—the "Hill Creek Extension"[13]—it carefully "reserved . . . for the benefit of and use of grazing district permittees, a free right-of-way for trailing and watering purposes" through the newly-added portion of the reservation to the area in dispute here. (Pet. App. 362a). Under the decision below, however, those "stock driveways" (Pet. App. 362a) will no longer lead to Taylor Grazing Act areas, but to an Indian reservation where grazing permits will not be valid despite the absence of any Indian presence in the region.[14]

3. The Tribe contends that the "public domain" language in the 1894 Act (Uncompahgre) and the 1902 Act (Uintah) had no effect because two later statutes—the 1897 Act (Uncompahgre) and the 1905 Act (Uintah)—were the operative legislation and these contained no such language (Brief in Opp., at 14-15). Not even the court below adopted this argument with respect to the original Uncompahgre reservation. Assuming the restored-to-the-public domain provision of the 1894 Act was implemented by the 1897 Act,[15] the

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[13] See Pet. 4-5 & n.11. The reservation status of the Hill Creek Extension is not at issue.

[14] This is a further reason why the United States should be called upon to express its views in this case. The issuance of Taylor Grazing Act permits by the Department of the Interior, which it has been doing for more than 40 years (Pet. App. 362a), is flatly inconsistent with the decision of the court below that the area is part of an Indian reservation.

[15] There has never been any doubt on this score. The United States, for example, answered the Tribe's petition in the Indian Claims Commission (see note 9 *supra*) by stating that with respect to the original Uncompahgre reservation—which the Tribe

court's point instead was that *Solem v. Bartlett, supra,* altered the settled rule that such language constituted a clear and unequivocal expression of disestablishment. See Pet. App. 11a-12a. As discussed in the Petition, it is on that point that *en banc* majority erred and rendered a decision in conflict with the decisions of this Court and the lower federal courts. See Pet. 14-21.[16]

4. The Tribe's remaining argument appears to be that because the Tribe was compensated for lands within the original Uintah reservation that, in 1905, were reserved for a national forest,[17] this shows that the reservation was not disestablished. Brief in Opp., at 13. To the contrary, it shows instead that the reservation ceased to exist.

The Tribe was compensated twice for the 1 million acres that is now a national forest, first pursuant to the Act of February 13, 1931, 46 Stat. 1092, in the

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itself alleged had been disestablished—the Tribe "suffered no loss by the restoration to the public domain . . . of the unallotted lands within the area. . . ." Answer of the United States, at p.17 (March 9, 1954), in *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States,* note 9 *supra.*

[16] In regard to the original Uintah reservation, the legislative history clearly shows, as the Petition discusses (Pet. 25-27), that the 1905 Act implemented the 1902 Act. The Tribe has no response. Moreover, the Court of Claims—accepting the Tribe's arguments—held that the 1905 Act implemented the 1902 Act and that pursuant to the 1902 Act allotments were made to tribal members "and surplus lands (with the exception of forest reserve and reclamation withdrawals and certain minimal entries) were restored to the public domain. . . ." *Uintah and White River Bands of Ute Indians v. United States,* 139 Ct. Cl. 1, 22 (1957).

[17] See Pet., at 28-29.

amount of $1.2 million. Dissatisfied with that payment, the Tribe sued the United States in the Court of Claims and—again contradicting the decision below and its position here—claimed "just compensation for 973,777 acres of the *former* Uintah Indian Reservation in Utah, taken by the United States on July 14, 1905, by incorporation into the Uintah National Forest." *Uintah and White River Bands of Ute Indians v. United States, supra*, 139 Ct. Cl. at 2-3 (emphasis added). The Court of Claims in that case awarded the Tribe an additional $879,000 plus interest from 1905 on the basis, in part, that the area had formerly been part of the Tribe's reservation; indeed, throughout its findings of fact, the Court of Claims referred to the "former Uintah Indian Reservation" (*e.g.* 139 Ct. Cl. at 28, 56, 64, 69, 70).

Thus, although "[t]here is, and can be, no dispute"[18] that the Tribe's reservation consists only of trust lands, the court below ruled to the contrary and in doing so has rendered a decision warranting review by this Court.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the petition for a writ of certiorari should be granted. In addition, it may be appropriate for the Court to invite the United States to express its views in this case.

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[18] *Affiliated Ute Citizens v. United States, supra*, 406 U.S. at 141.

Respectfully submitted,

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